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IN THE
Supreme Court of the United States

COLORADO OFFICE OF CONSUMER COUNSEL, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AVISTA ENERGY, INC., POWEREX CORP., PUBLIC SERVICE COMPANY OF NEW MEXICO, AND PUGET SOUND ENERGY, INC.

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QUESTION PRESENTED

Whether the D.C. Circuit correctly held that the Federal Energy Regulatory Commission — having initiated on its own motion a narrowly focused, policy-making proceeding to establish industry-wide rules to regulate sellers' behavior in interstate energy markets — was not required to decide, in its order concluding that proceeding, any question other than which market-behavior rules to adopt.

PARTIES TO THE PROCEEDINGS

Petitioners incorrectly identify the Federal Energy Regulatory Commission ("FERC") as the only respondent in this case. Although FERC was the only respondent in the court of appeals proceedings, Avista Energy, Inc., Edison Electric Institute, Powerex Corp., Public Service Company of New Mexico, and Puget Sound Energy, Inc. participated as intervenors in the court of appeals proceedings. Pursuant to this Court's Rule 12.6, they also "are considered respondents."

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents Avista Energy, Inc., Powerex Corp., Public Service Company of New Mexico, and Puget Sound Energy, Inc. state the following:

Avista Energy, Inc. is a wholly owned subsidiary of Avista Capital, Inc., which in turn is a wholly owned subsidiary of Avista Corporation. Avista Corporation is a diversified energy company that is publicly held.

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

Public Service Company of New Mexico ("PNM") is a corporation organized and existing under the laws of the State of New Mexico, and is engaged primarily in the generation, transmission, distribution, and sale of electricity and in the transmission, distribution, and sale of natural gas within the State of New Mexico. PNM is a wholly owned subsidiary of PNM Resources, Inc. ("PNM Resources"), which is a corporation organized and existing under the laws of the State of New Mexico. PNM Resources is a publicly traded company and has issued securities to the public. Other than PNM Resources, PNM has one affiliate, Texas-New Mexico Power Company, that has issued shares or debt securities to the public.

Puget Sound Energy, Inc., a State of Washington corporation, is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail. Puget is a wholly owned subsidiary of Puget Energy, Inc., a holding company. Puget Energy, Inc. has issued equity or debt securities to the public.

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INTRODUCTION

The petition presents no question warranting review by this Court. The Federal Energy Regulatory Commission ("Commission" or "FERC") initiated a policy-making proceeding on its own motion, in which it proposed to adopt rules to govern the behavior of sellers in wholesale energy markets and to implement those rules by including them in all existing and future tariffs authorizing sales at market-based rates. After the Commission adopted six such rules and amended all existing tariffs to include those rules, petitioners sought review in the D.C. Circuit, claiming that FERC also was required to amend those tariffs to include Commission-prescribed prices, thereby eliminating sellers' authority to provide energy at market-based rates. The D.C. Circuit rejected those claims, recognizing the Commission's authority under Section 206 of the Federal Power Act and basic principles of administrative law to confine the scope of a proceeding initiated on its own motion to the particular, discrete policy issue the Commission sought to resolve.

Petitioners' claim that the D.C. Circuit erred does not merit review by this Court. Petitioners failed to preserve their claim because they did not raise it before the Commission on rehearing; they are jurisdictionally barred from doing so now. The D.C. Circuit's decision, in any event, was correct. Nothing in Section 206 precludes the Commission from structuring a proceeding, initiated on its own motion, to resolve a discrete policy issue, and only that issue. Furthermore, petitioners' claim presents no issue of continuing importance: the Commission rescinded its market-behavior rules two years ago at Congress's direction. Finally, petitioners identify no circuit split

on FERC's policy-making authority under Section 206, nor do they identify any decisions of this Court that actually conflict with the decision below.

Petitioners then launch a broad-based challenge to FERC's long-standing interpretation of the Federal Power Act to permit it to authorize sales of wholesale energy at market-based rates. The D.C. Circuit did not reach that issue because it correctly found that the Commission had no obligation, in this proceeding, to set sellers' rates. In any event, that question independently does not warrant review. Petitioners' rehearing request before FERC did not include this claim, which also is outside the scope of the policy-making proceeding the Commission initiated. And petitioners identify no conflict warranting this Court's review. Petitioners offer the novel — and unprecedented — suggestion that FERC's arguments in its brief to the D.C. Circuit conflict with this Court's decisions. But this Court sits in review of neither arguments made in an agency's court of appeals brief nor purely intracircuit conflicts, which is the only type of conflict petitioners claim to identify. And even that contention is incorrect.

Finally, petitioners' claim that this Court's intervention is necessary to eliminate substantial uncertainty about FERC's authority lacks merit because, in 2005, Congress ratified the Commission's interpretation of the Federal Power Act. Congress expressly authorized the Commission to prevent market manipulation and to ensure price transparency in competitive markets, while enacting a special remedial provision applicable to those few sellers that had their market-based rate authority revoked. Those provisions presume that other sellers in wholesale energy markets will continue to engage in transac-

tions at market-based rates under FERC-approved market-based rate tariffs. Accordingly, there is no warrant for this Court's further review of this case.

STATEMENT OF THE CASE

1. In 1935, Congress enacted the Federal Power Act,[1] which delegates to FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *see* 16 U.S.C. § 824. Sellers of wholesale energy must file, "[u]nder such rules and regulations as the Commission may prescribe" and "within such time and in such form as the Commission may designate," "schedules" showing rates for sales of wholesale electricity. 16 U.S.C. § 824d(c).

Historically, electric utilities charged fixed wholesale rates, which were based on the cost of providing service plus a reasonable rate of return.[2] In the early 1970s, FERC started allowing sellers to file tariffs containing formula rates, which specified the cost components of the rate; under those tariffs, rates changed as costs fluctuated. *See Public Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001).

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[1] Title II of the Public Utility Act of 1935, ch. 687, 49 Stat. 803, 838-63 (codified as amended at 16 U.S.C. §§ 791a-825r).

[2] *See Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758 (9th Cir. 2004), *cert. denied*, 545 U.S. 1149 (2005). *See generally* Final Rule, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,543-46 (1996) ("*Promoting Wholesale Competition*") (recounting the historical development of the electric energy industry).

Later, FERC began approving tariffs under which rates would be set in the market. *See, e.g., Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 (1989). As FERC has explained, "[m]arket-based rates helped to develop competitive bulk power markets." *Promoting Wholesale Competition*, 61 Fed. Reg. at 21,545.

Before authorizing a seller to make any sales under a market-based rate tariff, the Commission requires the seller to "establish that it, and its affiliates, either do not have, or have adequately mitigated, market power." *Grand Council of Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000); *see Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 176 (D.C. Cir. 1994) (per curiam). That requirement is the key to the Commission's market-based rate regime. As courts have recognized, FERC's determination that a seller lacks market power — a determination that FERC makes before the seller is authorized to conduct transactions at the market rate and that FERC revisits at least every three years — establishes that the forces of supply and demand will assure that the seller's rates are just, reasonable, and not unduly discriminatory, as required by § 205(a) and (b). *See, e.g., Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) ("Where there is a competitive market, [the Commission] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [§ 205(a)'s just-and-reasonable-rate] requirement."); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are

reasonable").[3] The Commission continues to examine and to refine its market-power analysis. *See* Final Rule, Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 119 FERC ¶ 61,295 (amending the Commission's regulations to refine the standards for granting market-based rate authority), *clarified*, 121 FERC ¶ 61,260 (2007).

2. Once sellers have tariffs on file, FERC has authority to initiate a hearing — "upon its own motion or upon complaint" — to determine whether any "rate, charge, classification, rule, regulation, practice, or contract" with respect to such tariffs "is unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a). When it institutes a proceeding on its own motion, the Commission "shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes." *Id.*; *see id.* (providing that FERC "shall specify the issues to be adjudicated" in any hearing held under this section). The Commission bears the burden of proof in such a proceeding. *See id.* § 824e(b). If the Commission carries that burden, FERC "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or

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[3] *See also, e.g.*, *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) ("Commission is not required to adhere rigidly to a cost-based determination of rates, much less to one that base[s] each producer's rates on his own costs"; "courts are without authority to set aside any rate adopted by the Commission which is within a zone of reasonableness") (alteration in original; internal quotation marks omitted); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963) ("[i]t has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates").

contract to be thereafter observed and in force, and shall fix the same by order." *Id.* § 824e(a).

FERC initiated such an investigation on November 20, 2001, as one of many Commission responses to the California energy crisis.[4] Specifically, the Commission "propose[d] to revise all existing market-based rate tariffs" — more than 1,100 — to add a condition expressly "prohibit[ing] [the seller] from engaging in anticompetitive behavior or the exercise of market power." Order Establishing Refund Effective Date and Proposing To Revise Market-Based Rate Tariffs and Authorizations, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220, at 61,975-76, 61,977-97 (2001). The Commission also proposed to include the same condition in all new market-based rate tariffs. *See id.* at 61,976. The Commission gave "interested entities" the "opportunity to file comments and reply comments regarding [this] proposal." *Id.* at 61,977.

In response to the more than 90 comments submitted, the Commission convened a staff conference "to determine whether and how the proposed tariff condition can be modified to address legitimate concerns that have been raised by the commenters."[5]

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[4] *See* FERC, Report to the United States Congress, *The Commission's Response to the California Electricity Crisis and Timeline for Distribution of Refunds* 7-19 (Dec. 27, 2005), *available at* http://www.ferc.gov/legal/staff-reports/comm-response.pdf.

[5] Notice of Staff Conference Agenda, Attach. B at 2, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Docket No. EL01-118-000 (FERC Mar. 1, 2002), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=1004800; *see also* Notice of Staff Conference, *Investigation of Terms and Conditions of Public Utility Market-*

Another 20 sets of comments were filed following the conference.

On June 26, 2003, the Commission issued a further order in which it "propose[d] to modify the tariff provision" it had initially proposed. Order Seeking Comments on Proposed Revisions to Market-Based Rate Tariffs and Authorizations, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349, at 62,372, ¶ 6 (2003). Instead of a single sentence generally prohibiting anticompetitive behavior and the exercise of market power, FERC now proposed six specific "Market Behavior Rules." *See id.* at 62,375-77, ¶¶ 18-36. The Commission then sought "comments on these proposed market behavior rules." *Id.* at 62,372-73, ¶ 6. Although its proceeding was not formally a rulemaking — because the Commission proposed to "revis[e] seller's market-based rate tariffs" and not to "amend[] . . . the Commission's regulations" — the Commission "direct[ed]" that its new proposal "be published in the *Federal Register*" in light of "the generic effect that [its] proposal [would] have on the industry as a whole." *Id.* at 62,373, ¶ 6 n.5; *see id.* at 62,380, ¶ 51 (explaining that the Commission was acting "by adjudication" in order to "develop[] policy").

3. On November 17, 2003, the Commission issued its order amending all existing market-based rate tariffs to include its six proposed Market Behavior Rules, as modified in light of the comments the Commission received. *See* Pet. App. 17a-128a. The Commission found that "sellers' existing tariffs" —

Based Rate Authorizations, Docket No. EL01-118-000 (FERC Feb. 25, 2002), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=6013056.

which lacked "clearly-delineated rules of the road to govern market participant conduct" — were "unjust and unreasonable." *Id.* at 19a; *accord id.* at 24a ("market-based rate tariffs . . . that do not include such standards are unjust and unreasonable"). The Commission found further that the Market Behavior Rules it adopted "are just and reasonable" and will "ensure that rates are the product of competitive forces (and thus are just and reasonable)." *Id.* at 19a, 101a. The Commission thus completed the "task before [it] in th[e] proceeding." *Id.* at 23a.

On rehearing, the Commission made further modifications and clarifications to its Market Behavior Rules, but otherwise denied the rehearing requests. *See id.* at 209a. The Commission also reiterated its prior conclusion that its "Market Behavior Rules and the procedures [it] . . . adopted with respect to their enforcement" would "assur[e] that wholesale electricity rates are and will remain just and reasonable." *Id.* at 208a. As in its prior orders, the Commission did not justify its adoption of those rules on findings that any specific seller's rates — let alone rates under all of the more than 1,100 tariffs that the Commission modified — were unjust and unreasonable. To the extent the Commission discussed rates, it found only that tariffs without its proposed Market Behavior Rules "*may* lead to unjust and unreasonable rates." *Id.* at 203a (emphasis added).

4. A number of sellers and purchasers, as well as petitioners here, filed petitions for review in the D.C. Circuit, challenging from opposing perspectives the substance of the Commission's rules and its enforcement mechanisms. While those petitions were pending, Congress passed the Electricity Modernization Act of 2005, Pub. L. No. 109-58, Tit. XII, 119 Stat.

594, 941 ("2005 Act"). Among other changes to the Federal Power Act, Congress added a section expressly addressing sellers' behavior in wholesale energy markets. Congress made it "unlawful . . . to use or employ, in connection with the . . . sale of electric energy, . . . any manipulative or deceptive device or contrivance." *Id.* § 1283 (codified at 16 U.S.C. § 824v(a)). Congress also authorized the Commission to promulgate "such rules and regulations . . . as necessary or appropriate in the public interest or for the protection of electric ratepayers." *Id.* In conjunction with these changes, Congress dramatically increased the maximum civil and criminal penalties applicable to violations of the Federal Power Act and Commission rules. *See id.* § 1284(d), (e) (codified at 16 U.S.C. §§ 825*o*, 825*o*-1) (maximum civil penalty raised to $1,000,000 from $10,000).

As the FERC Chairman acknowledged, the 2005 Act thus "did not ratify" the Commission's use of tariff amendments to implement Market Behavior Rules, but instead "directed the Commission to use a different regulatory model," namely, the promulgation of regulations.[6] Following Congress's direction, the Commission proposed new regulations, modeled on the Securities and Exchange Commission's Rule 10b-5 (17 C.F.R. § 240.10b-5),[7] and further proposed "repealing the Market Behavior Rules" it had added to market-based rate tariffs "once [it] ha[s] issued

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[6] Statement of Chairman Kelliher at 1 (Nov. 17, 2005), *available at* http://www.ferc.gov/news/statements-speeches/kelliher/2005/11-17-05-kelliher-rules.pdf.

[7] *See* Notice of Proposed Rulemaking, *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005).

final regulations."[8] FERC promulgated those final regulations on January 19, 2006,[9] and rescinded the Market Behavior Rules a month later.[10] All of the petitioners before the D.C. Circuit — except petitioners here — subsequently abandoned their challenges to FERC's Market Behavior Rules.

5. On June 22, 2007, the D.C. Circuit — in a short, per curiam opinion — denied the sole remaining petition for review. The court recognized that FERC, "on its own motion," had "initiated an investigation into the specific issues of anticompetitive behavior and market manipulation," in which it proposed to "condition[] all market-based rate tariffs on new Market Behavior Rules that would prohibit these practices." Pet. App. 5a. By "enacting the Market Behavior Rules," the court found, the Commission had "act[ed] upon [its] finding" that "regulations, practices, or contracts affecting [sellers'] rates" are "unjust or unreasonable," consistent with the

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[8] Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 113 FERC ¶ 61,190, at 61,769, ¶ 1 (2005).

[9] *See* Final Rule, Order No. 670, *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047, *reh'g denied*, 114 FERC ¶ 61,300 (2006). No party petitioned for review of FERC's new regulations.

[10] *See* Order Revising Market-Based Rate Tariffs and Authorizations, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, *reh'g denied*, 115 FERC ¶ 61,053 (2006). The rescission took effect on February 27, 2006. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations; Order Revising Market-Based Rate Tariffs and Authorizations*, 71 Fed. Reg. 9811 (2006). No party petitioned for review of FERC's rescission of its amendment of market-based rate tariffs.

requirements of Section 206 of the Federal Power Act. *Id.* at 4a, 5a.

The court held further that the "plain language" of Section 206 did "not require the Commission, having found only one aspect of the tariffs to be unjust or unreasonable," to "reopen and reevaluate all other aspects of the filed [tariffs]." *Id.* at 3a-4a. Instead, the Commission was permitted to address only the "discrete issue" that "it had set forth in its order initiating the section 206 proceeding." *Id.* at 4a-5a; *see id.* at 4a (citing provisions of the Federal Power Act that "make[] clear that section 206 proceedings are designed to identify and address such discrete issues").

The court denied a petition for rehearing and rehearing en banc on August 20, 2007. *See id.* at 6a-7a.

REASONS FOR DENYING THE PETITION

I. THE D.C. CIRCUIT'S INTERPRETATION OF SECTION 206 PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW

The D.C. Circuit held that Section 206 permits FERC to conduct a proceeding, initiated on its own motion, to address and resolve a discrete policy issue, without having that proceeding expanded by commenters seeking a ruling on a different set of issues. That holding presents no question warranting this Court's plenary review.

A. The Petition's Main Argument Is Jurisdictionally Barred

Petitioners did not raise in their rehearing request before FERC their claims about the Commission's obligations under Section 206; therefore, petitioners are jurisdictionally barred from presenting those claims to this Court.

Congress provided that "[n]o objection" to a FERC order "shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing." 16 U.S.C. § 825*l*(b).[11] This Court has repeatedly held that this provision means that, where a "point was not raised before the Commission" on rehearing, it "is not for our consideration here." *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 156-57 (1960)[12]; *Escondido*

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[11] Although such a failure can be excused if there is "reasonable ground for failure so to do," 16 U.S.C. § 825*l*(b), petitioners have never articulated such a ground.

[12] In *Sunray*, the Court was interpreting the analogous provision of the Natural Gas Act, 15 U.S.C. § 717r(b). The Court's "established practice" is to apply judicial interpretations of the Natural Gas Act "interchangeably" to their "substantially iden-

Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 779 n.23 (1984) ("The licensees did not object to this conclusion in their petition for rehearing to the Commission, and they may not challenge it now."). Indeed, even objections "arguably 'implicit' in other objections" are "not properly preserved" if those "objections [were] not explicitly presented" in a rehearing request. *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004). Moreover, this is a "jurisdictional requirement[]," and "[n]either FERC nor th[e] court has authority to waive these statutory requirements." *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 112-13 (D.C. Cir. 1989); *see FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-98 (1955) (rejecting claim that court has authority, *sua sponte*, to consider argument not raised in rehearing request).

On rehearing, petitioners presented only a single argument related to Section 206, in which they sought "clarification as to whether the Commission intended to find that the 'market-based' tariffs and authorizations . . . will be 'just and reasonable' if sellers include the Market Behavior Rules in their tariffs." Rehearing Request[13] at 3. Petitioners did assert, in passing, that the "Commission ha[d] not

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tical" counterparts in the Federal Power Act. *E.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (internal quotation marks omitted).

[13] Request for Rehearing on Behalf of Colorado Office of Consumer Counsel *et al.*, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Docket Nos. EL01-118-000 & EL01-118-001 (FERC filed Dec. 16, 2003) ("Rehearing Request"), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10014144:0.

met th[e] legal requirement" in Section 206 to "'fix' a rate within the meaning of the statute." *Id.* But petitioners made that assertion as a basis for their request for clarification of the findings the Commission had intended to make. *See id.* (explaining, in the immediately following sentence, that petitioners "*therefore* request clarification") (emphasis added). Petitioners nowhere claimed on rehearing, as they do here, that FERC could not comply with Section 206 unless it not only added the Market Behavior Rules to the tariffs but also set specific prices that all sellers may charge, thereby revoking their market-based rate authority. They are barred from doing so now.[14]

B. The D.C. Circuit Correctly Upheld FERC's Authority To Control The Scope Of Proceedings That It Initiates On Its Own Motion

In any event, the D.C. Circuit correctly rejected petitioners' claims. The Commission, acting under Section 206, found that a "rule, regulation, practice, or contract affecting [a] rate" — here, the absence of Market Behavior Rules from sellers' tariffs — "is unjust[] [and] unreasonable." 16 U.S.C. § 824e(a); *see* Pet. App. 19a, 24a, 203a. Section 206 provides that, when the Commission makes such a finding, it "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, *or* contract to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a) (emphasis added). In issuing its order adopting the

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[14] Although the D.C. Circuit did not address petitioners' waiver of their lead claim, because 16 U.S.C. § 825*l*(b) establishes a jurisdictional rule, this Court would be required to pass on that question before reaching the substantive questions regarding Section 206 that petitioners seek to present.

Market Behavior Rules, the Commission complied with the statute. Through a notice-and-comment process, the Commission "determine[d] the just and reasonable . . . rule, regulation, [and] practice . . . to be thereafter observed" — namely, the six Market Behavior Rules — and it "fix[ed] the same by order," when it amended all existing tariffs to include those rules. *Id.*; *see* Pet. App. 19a, 101a, 208a.

Section 206 is written in the disjunctive and therefore does not require the Commission *also* to have fixed a rate to be observed going forward. That is especially true where — as here — the Commission made no finding that rates charged by any of the more than 1,100 sellers with market-based rate authority were unjust and unreasonable. Instead, the Commission repeatedly found only that "existing *tariffs*" were "unjust and unreasonable" because they did "not include" the Market Behavior Rules the Commission adopted. *E.g.*, Pet. App. 19a, 24a (emphasis added). The D.C. Circuit, therefore, correctly held that FERC committed "no error" in limiting its decision to amending those tariffs "with respect to the only issues it had set forth in its order initiating the section 206 proceeding." *Id.* at 5a.

The D.C. Circuit also properly upheld FERC's authority to initiate a Section 206 proceeding that is limited to a "discrete issue" regarding existing tariffs, without thereby becoming obligated to "reopen and revaluate all other aspects of the filed [tariffs]." *Id.* at 4a. As the Commission explained, in the underlying proceeding it was "developing policy" that would have a "generic effect" on the "industry as a whole," and was doing so "by adjudication." 103 FERC ¶ 61,349, at 62,373, 62,380, ¶¶ 6 n.5, 51. "No principle of administrative law is more firmly

established than that of agency control of its own calendar," which includes authority to control the "scope of the inquir[ies]" it undertakes. *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967). This Court has repeatedly recognized that "agencies should be free . . . to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (internal quotation marks omitted). An agency, moreover, "need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991).

As the D.C. Circuit recognized, the Federal Power Act is consistent with that basic rule. It authorizes the Commission to initiate an investigation under Section 206 "upon its own motion." 16 U.S.C. § 824e(a). When the Commission does so, it must "state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes." *Id.* FERC likewise must "specify the issues to be adjudicated" in any Section 206 hearing. *Id.* In these ways, the Federal Power Act "makes clear that section 206 proceedings are designed to identify and address such discrete issues." Pet. App. 4a. To be sure, the text of Section 206 — which requires the Commission to "state the change *or changes*" it proposes — does not preclude the Commission from including multiple issues in a single proceeding. But that text unambiguously permits the Commission to follow the narrowly circumscribed course it charted here.

Petitioners' various challenges to the D.C. Circuit's ruling lack merit. They misread the Commission's orders in claiming both that the "topic" of the Commission's Section 206 proceeding was "the lawful rates to be enforced" and that the Commission found particular "rate[s] . . . to be unlawful." Pet. 10, 11-12, 13. But the question the Commission posed had to do with Market Behavior Rules, and the Commission made no findings about any particular seller's rates. *See supra* pp. 6-8.

Petitioners also misread the D.C. Circuit's decision in claiming that the court required the Commission to "be completely clairvoyant so as to know, before the hearing, every element of . . . [a] rate that may be unlawful." Pet. 10; *see* Pet. 11-13. In fact, the court simply upheld the Commission's authority to engage in policy-making through proceedings that focus on discrete issues. To the extent that private parties maintain that FERC should consider other issues, they can attempt to persuade FERC to do so by filing their own complaints under Section 206, in which they can specify their proposed "change or changes to be made" to the tariffs "then in force." 16 U.S.C. § 824e(a).[15]

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[15] Petitioners also misread the D.C. Circuit's use of the word "rate" in the court's reference to "the Commission [having] 'fixed' the rate." Pet. App. 5a. Throughout its opinion, the court used "rate" to mean not only the particular price at which energy is sold, but also "all other aspects" of the filed tariff. *Id.* at 4a; *see id.* (referring to "rates (or regulations, practices, or contracts affecting those rates)"). In doing so, the D.C. Circuit was following this Court's recognition that the "filed rate doctrine" is not limited to rates, as rates "do not exist in isolation" and "have meaning only" in light of the various terms and conditions on which "the services to which they are attached" are

C. The Market Behavior Rules Adopted In The Challenged FERC Orders Are Of No Continuing Importance

In the 2005 Act, Congress directed the Commission to make policy regarding market manipulation through the promulgation of new regulations, rather than the amendment of sellers' tariffs. As a result, the Commission rescinded the Market Behavior Rules it adopted effective February 27, 2006, and the regulations the Commission promulgated under its new authority have been in effect for more than two years. Even if these subsequent developments do not render petitioners' claims moot, *cf.* Pet. App. 3a, their claims about the scope of the Commission's authority to engage in policy-making through tariff amendments are of no continuing importance.

D. Petitioners Identify No Circuit Conflict

Other circuit decisions are in complete agreement with the judgment below. Indeed, perhaps recognizing the absence of any circuit conflict, petitioners make the rather extraordinary argument that this Court should grant certiorari to resolve a supposed conflict with three of this Court's cases. None of those cases, however, addressed the scope of the Commission's authority under Section 206 in this regard.

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), involved the Commission's review of an individual seller's proposed contract amendment and was not an industry-wide, policy-making proceeding. *See id.* at 336. Moreover, in the portions of the Court's opinion that petitioners

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sold. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998).

cite (Pet. 10-11), the Court was not addressing the Commission's authority to control the scope of proceedings it initiates on its own motion, but instead was rejecting the claim that sellers "are empowered to 'initiate' unilateral contract changes under" the Natural Gas Act's equivalent of Section 206 of the Federal Power Act. *Mobile*, 350 U.S. at 340-41.

The other two cases that petitioners cite are equally far afield. In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Federal Power Commission ("FPC") initiated a proceeding intended "to determine maximum just and reasonable rates for sales in interstate commerce." *Id.* at 754. Petitioners note that the FPC considered in that proceeding statutory and constitutional "challenges to [its] authority to set [such] rates." Pet. 11. But the Commission did the same thing here, with respect to the issue it set out to resolve in this proceeding. *See* Pet. App. 94a-103a (considering and rejecting statutory and constitutional challenges to its legal authority to promulgate the Market Behavior Rules that it proposed); *id.* at 136a-138a, 202a-204a (same).

In *New York v. FERC*, 535 U.S. 1 (2002), the Commission initiated a "rulemaking proceeding" regarding the unbundling of transmission services and "cited §§ 205-206 of" the Federal Power Act as the basis for its legal authority to do so. *Id.* at 10-11. But the Commission's decision to adopt policy through rulemaking in that case poses no conflict with its decision to proceed in a different manner here. *See* 103 FERC ¶ 61,349, at 62,380, ¶ 51 (noting that FERC "is not limited to notice and comment rulemaking in developing policy" and has "considerable discretion to choose whether to proceed by rulemaking or by adjudication"); *see also, e.g.*, *NLRB v.*

Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion.").

II. PETITIONERS' CLAIMS THAT FERC'S AUTHORIZATION OF SALES AT MARKET-BASED RATES VIOLATES SECTION 205 ARE NOT PROPERLY PRESENTED HERE

The D.C. Circuit did not reach the remainder of petitioners' claims, which challenge the lawfulness of market-based rate tariffs — with or without market-behavior rules — under Section 205 of the Federal Power Act. That issue also does not warrant this Court's review. The D.C. Circuit properly did not reach the issue because it had correctly rejected petitioners' argument that FERC's order amending tariffs to include the Market Behavior Rules did not fulfill its obligations under Section 206. Petitioners must prevail on their claim that Section 206 required the Commission, in its market-behavior *rule* proceeding, also to establish *rates* for all sellers in order for the Court to reach the question whether the Federal Power Act permits such FERC-mandated rates to be market-based. Because petitioners cannot prevail on that preliminary question regarding Section 206, this case is not a proper vehicle for presenting that secondary question regarding Section 205.

A. Petitioners' Section 205 Claim Is Jurisdictionally Barred

As with their Section 206 claims, petitioners' claim that Section 205 of the Federal Power Act does not permit market-based rates is jurisdictionally barred under 16 U.S.C. § 825*l*(b). In asserting on rehearing that FERC lacks authority to approve market-based rate tariffs, petitioners did not cite — much less

analyze — any specific provision of Section 205. *See* Rehearing Request at 4-8. If petitioners "wished to argue that FERC was ignoring the language of [Section 205], [they] had an obligation to make that argument to the Commission. Having failed to do so, [they] may not ask [a court] to entertain the argument now." *Domtar Maine Corp. v. FERC*, 347 F.3d 304, 313 (D.C. Cir. 2003).

Even if petitioners had adequately raised their Section 205 claims on rehearing, those claims still would not properly be presented on review of FERC's orders. As shown above, the Commission established a narrowly cabined, policy-making proceeding in which it proposed to add market-behavior rules to existing and future tariffs, and FERC repeatedly sought comments *only* on its proposed rules. *See* 97 FERC ¶ 61,220, at 61,977 (giving "interested entities" the "opportunity to file comments . . . regarding [its] proposal"); 103 FERC ¶ 61,349, at 62,372-73, ¶ 6 (seeking "comments on these proposed market behavior rules"). The Commission, therefore, properly "decline[d] to address" in that proceeding petitioners' claims that FERC was obligated to scrap its market-based rate regime, as those claims went well beyond FERC's focus on its policies related to the regulation of "seller conduct" in wholesale markets. Pet. App. 184a-185a. Just as a court would "clearly oversho[o]t the mark" if it ordered the Commission to expand the scope of a proceeding, *Mobil Oil*, 498 U.S. at 230, a private party cannot force the Commission to do so by including additional issues in comments and a rehearing request.

B. No Circuit Conflict Exists On This Question

Even aside from those jurisdictional barriers to this Court's consideration of petitioners' Section 205 claims, petitioners identify no circuit split on the question whether FERC's orders over the past 20 years authorizing sales of wholesale electricity at market-based rates are consistent with the Federal Power Act. On the contrary, courts of appeals have uniformly rejected challenges to the Commission's approval of market-based rate tariffs. *See, e.g.*, *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1011-13 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). As these courts have recognized, in "competitive markets, FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a just and reasonable result." *Consumers Energy Co. v. FERC*, 367 F.3d 915, 922-23 (D.C. Cir. 2004) (internal quotation marks omitted). This Court, moreover, has denied petitions raising the same challenges to the Commission's authority that petitioners seek to present here. *See California ex rel. Brown v. Coral Power, LLC*, 127 S. Ct. 2972 (2007) (No. 06-1100); *Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 545 U.S. 1149 (2005) (No. 04-621).[16]

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[16] Petitioners do contend that the D.C. Circuit's decision below "conflicts with precedent in that Circuit." Pet. 16-18. Even aside from the fact that the D.C. Circuit's decision here did not reach the question whether FERC's authorization of sales at market-based rates complies with the Federal Power

C. There Is No Conflict With This Court's Decisions

Petitioners claim to identify a conflict with two of this Court's decisions involving other industries, *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). *See* Pet. 14-16. But petitioners do not assert that the D.C. Circuit's decision conflicts with those rulings. Nor could they. The D.C. Circuit did not reach the question of FERC's authority under the Federal Power Act to authorize sales at market-based rates. Implicitly recognizing that, petitioners claim instead that FERC's "argu[ments] below" conflict with those decisions. Pet. 15. Just as this Court "reviews judgments, not statements in opinions," *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (internal quotation marks omitted), it also does not sit in review of arguments made in appellate briefs.

In any event, both *Maislin* and *MCI* involved fundamentally different agency actions and statutory schemes. In *Maislin*, the Court struck down an Interstate Commerce Commission ("ICC") policy that prevented common carriers from recovering from shippers the filed rate, when the parties had privately negotiated a lower rate that was not on file with the ICC. *See* 497 U.S. at 130-32. The Court

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Act — and, therefore, cannot conflict with any decisions of any court on that question — this Court does not grant certiorari to resolve intracircuit conflicts, as it is "the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, as noted in the text, those D.C. Circuit decisions that squarely involved FERC's market-based rate regime and the Federal Power Act do not hold that FERC exceeded its authority under that Act.

held that the ICC's policy of enforcing unfiled, privately negotiated rates over filed rates "undermines the basic structure of the [Interstate Commerce Act]," *id.* at 132, which "forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate," *id.* at 130. Thus, the problem in *Maislin* was not that the rates were set by negotiation — it was that those rates differed from the rate on file with the agency. Here, by contrast, sellers charge only the rates set forth in their rate schedules — that is, the market rate — and they do so pursuant to a FERC regulatory regime that ensures the absence of market power that could be abused in the kind of secret transactions at issue in *Maislin*.

In *MCI*, the Court invalidated the "permissive detariffing" policy of the Federal Communications Commission ("FCC"), under which the FCC exempted "nondominant" carriers from the tariff-filing requirement of the Communications Act of 1934. 512 U.S. at 221. As in *Maislin*, the agency's policy eliminated "the heart of the common-carrier section of the Communications Act" — the tariff-filing requirement, *id.* at 229 — and therefore could not be justified by the FCC's statutory authority to "modify" the statute's requirements. *See id.* at 229-32. In contrast, under FERC's market-based rate regime, electricity sellers must file and abide by market-based rate tariffs, and must comply with a host of regulatory requirements — including reporting on their market power and information about their market transactions (including prices), as well as FERC's recently promulgated market-behavior regulations. *See, e.g.*, 18 C.F.R. §§ 1c.2, 35.10b. Far from having "deregulate[d] the [wholesale power]

industry," *MCI*, 512 U.S. at 220, FERC exercises substantial regulatory oversight.

Furthermore, unlike the statutes at issue in *Maislin* and *MCI*, the "heart" of the Federal Power Act is the integrity of privately negotiated contracts, not the tariff-filing requirement.[17] As this Court recently recognized, in enacting the Federal Power Act, "Congress departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 479 (2002). Congress did so because it recognized that, "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who [can] be expected to negotiate a 'just and reasonable' rate as between the two of them." *Id.*

D. Passage Of The 2005 Act Removes Any Remaining Significance Of This Case

There is no "substantial legal uncertainty" regarding the Commission's authority to approve market-based rate tariffs. Pet. 18-24. Even if there were any such uncertainty, Congress removed it in 2005 with the Electricity Modernization Act. A number of provisions of the 2005 Act presume that sellers will operate under market-based rate tariffs — and in markets that necessitate the use of such tariffs — demonstrating Congress's acquiescence in the

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[17] *See, e.g., Boston Edison Co. v. FERC*, 856 F.2d 361, 370 (1st Cir. 1988) ("[A] salient purpose of the Federal Power Act was to preserve the 'integrity of contracts, . . . [thereby permitting] the stability of supply arrangements.'") (quoting *Mobile*, 350 U.S. at 344) (second and third alterations in original).

Commission's long-standing interpretation of its authority under Section 205.

These provisions include Congress's prohibition on the use, "in connection with the purchase or sale of electric energy . . . , [of] any manipulative or deceptive device or contrivance," 2005 Act § 1283 (codified at 16 U.S.C. § 824v(a)), which is the provision that led the Commission to rescind the Market Behavior Rules. Congress also directed FERC "to ensure that . . . competitive markets are protected from," among other things, "anticompetitive behaviors." *Id.* § 1281 (codified at 16 U.S.C. § 824t(b)(2)). Congress's prohibitions on market manipulation necessarily presume the existence of rates set by the market, rather than through regulation.

Congress also directed the Commission "to facilitate price transparency in markets for the sale . . . of electric energy" and to prevent the "untimely public disclosure of transaction-specific information." *Id.* (codified at 16 U.S.C. § 824t(a)(1), (b)(2)). If the Federal Power Act required that the "actual rates" charged "be contained in a filed tariff," as petitioners' contend (Pet. 17), there would be no need for additional Commission action to ensure "price transparency" and the public disclosure of "transaction-specific" pricing information.

Finally, Congress enacted a special remedial provision applicable to sales of wholesale electricity in the Western states prior to June 20, 2001, by sellers that had the Commission "revoke[] [their] authority to sell any electricity at market-based rates." 2005 Act § 1290(a)(2). This provision — entitled "Relief for Extraordinary Violations" — is plainly directed at sellers, such as Enron, that lost their market-based

rate authority through punitive Commission action.[18] This section thus presumes that FERC is not required, as petitioners claim, to revoke *all* sellers' market-based rate authority.

In all of these ways, Congress's amendments to the Federal Power Act "effectively ratified the [Commission's] previous position" regarding its authority under Section 205 to authorize sales at market-based rates. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

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[18] *See* Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004).

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